A

PENGARAH HOSPITAL GUA MUSANG & ORS v. ABDULLAH MAT

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
VARGHESE GEORGE JCA
B NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: D-01(NCVC)(W)-54-02-2014]
19 APRIL 2016

C ***TORT:*** *Negligence – Medical negligence – Patient received blood transfusions at hospital – Patient confirmed to be HIV-positive five years later and passed away – Whether hospital complied with standard safety procedures practised in all Government hospitals relating to blood transfusions – Whether necessary measures taken to ensure that blood used in deceased's blood transfusion was safe and HIV-free – Whether early treatment could have been given upon detection of HIV*
D *virus – Whether patient died due to AIDS*

The respondent's ('the plaintiff') daughter ('the deceased') received treatments for her heart condition at Hospital Raja Perempuan Zainab II ('HRPZ') and Hospital Gua Musang ('HGM') in 2004. During this period, the deceased received blood transfusions. Following the treatments, her
E condition stabilised. Five years later, the deceased suffered from prolonged fever and coughing. When her condition failed to improve, the doctors at HRPZ conducted immunisation tests. The results showed that the deceased was HIV-positive. She later passed away due to brain abscess (with underlying HIV infection and severe immunosuppression). The plaintiff
F commenced a claim for medical negligence at the High Court against the appellants ('the defendants') on the grounds that the defendants failed to (i) comply with the standard safety procedures ('SOP') practised in all Government hospitals relating to blood transfusions; (ii) take necessary measures to ensure that the blood used in the deceased's blood transfusion
G was safe and HIV-free; (iii) give early treatment to the deceased upon detection of the HIV in her body to contain the disease which led to her death from AIDS. The defendants denied the plaintiff's allegations and in support of their defence, called medical experts who testified, *inter alia*, that (i) the SOP relating to blood transfusion practised in all Government hospitals had
H been complied with; (ii) the blood donors were free of HIV virus; (iii) HIV could be contracted through various means and not necessarily through blood transfusion; and (iv) progression from HIV infection to AIDS on the average is around eight to ten years although it can be shorter in the case of a child. The High Court Judge ('the HCJ') allowed the plaintiff's claim based on the finding that the blood transfusion procedure on 12 May
I 2004 was unsafe as there were discrepancy of dates. The defendants claimed that the date the blood bag No. A/008108 ('the blood bag') was used was 12 May 2004 while the report of the blood bank ('P7') showed that the blood

bag was received on 14 May 2004. This discprecancy, coupled with the defendants' admission that there were labelling mistakes in the past, gave rise to a doubt as to whether the blood in the blood bag or some other person's blood, had been used in the blood transfusion on 12 May 2004. Hence, the present appeal. The defendants submitted that the HCJ erred in holding that the HIV virus found in the deceased's body was due to the unsafe blood transfusion procedure carried out on her on 12 May 2004.

Held (allowing appeal)
Per Lim Yee Lan JCA delivering the judgment of the court:

(1) The plaintiff did not adduce any medical evidence of an expert to assist the High Court in determining complex questions such as (i) which of the SOP relating to blood transfusion in Government hospitals had been breached by the defendants; (ii) circumstances under which a person could be infected with the HIV virus; (iii) when the HIV infection could lead to full-blown AIDS; and (iv) whether the HIV infection could be treated if given early treatment in the case of a person having an underlying medical condition as in the case of the deceased. Therefore, the plaintiff could not be said to have discharged his legal and evidential burden or proving that the HIV virus in the deceased's body was directly due to the blood transfusion and that she died from AIDS. (paras 34 & 35)

(2) The HCJ erred in holding that the blood transfusion on 12 May 2004 was unsafe. The defendants had more than sufficiently discharged their burden of proof by adducing credible and convincing evidence to show that (i) the blood transfusion carried out on 12 May 2004 complied with the SOP practised in all Government hospitals relating to blood transfusion; (ii) the blood used in that transfusion was screened for HIV and other infectious diseases; and (iii) the blood was free from HIV virus. (paras 63 & 64)

(3) The HCJ totally ignored three other dates found on P7 which showed that it was more consistent that screening of the blood in the bag took place on 10 May 2004 rather than on 14 May 2004. These dates appeared at (i) the bottom section of the form where next to the words 'Tarikh/Masa Terima' was written the date '10/05/04' and 'Keputusan disahkan oleh: …' and next to the word 'Tarikh' was written the date '11/05/04'; (ii) the top right section of P7 where beneath the words 'Makmal Ujian Saringan', next to the words 'Tarikh Ujian Dijalankan' was written the date '10/05/04'; and (iii) at the bottom right section of the form where next to the words 'Keputusan diterima oleh' was a name in rubber stamp 'Hasmah bt Ismail' and next to the words 'Tarikh & masa diterima' was written the date '11 Mei 2004'. (para 49)

(4) The HCJ failed to consider that apart from P7, there were other contemporaneous records/documents relating to the blood transfusion on 12 May 2004 which showed that the blood used in the blood transfusion on 12 May 2004 was from the blood bag and the same was screened for HIV virus on 10 May 2004. The information on the tag of the blood bag tallied with the information on the deceased's patient call card where it was recorded that the blood transfusion was carried out on 12 May 2004. (paras 50 & 53)

(5) The deceased's death certificate stated that her cause of death was brain abscess (with underlying HIV infection and severe immunosuppression). No post-mortem was conducted on the deceased to determine the actual cause of death. The HCJ's pronouncement that the cause of death was AIDS and not the underlying condition the deceased was suffering from was, in the absence of any medical evidence, pure conjecture or guess which, as a trial judge, His Lordship was not entitled to make. (para 66)

(6) Based on 'Borang Pendaftaran Penderma Darah', the blood test results for HIV in the blood bag used for the transfusion on 12 May 2004 were non-reactive. After the blood transfusion on 12 May 2004 became an issue, the donor was recalled for HIV test and the test result again showed that he was free of the HIV virus. (paras 54 & 55)

(7) There were no objective facts from which it could be inferred, as a matter of reasonable probability, that the deceased died of AIDS. The period between her initial infection with HIV and her death on 28 August 2009 was five years. The gestation period from HIV infection to AIDS is between eight to ten years. This gives rise to the question whether the general period of progression from HIV to AIDS of between eight to ten years could have been modified or accelerated by the underlying medical condition the deceased was suffering from. Such a question could only be answered by a medical expert in the HIV/AIDS field which was not adduced in this case. (paras 68 & 70)

Bahasa Malaysia *Headnotes*

Anak perempuan ('si mati') responden ('plaintif') mendapat rawatan bagi masalah jantung di Hospital Raja Perempuan Zainab II ('HRPZ') dan Hospital Gua Musang ('HGM') pada 2004. Dalam tempoh ini, si mati menerima pemindahan darah. Setelah menerima rawatan, keadaan si mati kembali stabil. Lima tahun kemudian, si mati mengalami demam dan batuk berterusan. Apabila keadaannya tidak pulih, doktor-doktor HRPZ menjalankan ujian imunisasi. Keputusan menunjukkan si mati positif HIV. Dia kemudian meninggal dunia akibat abses otak (dengan jangkitan HIV dan imunotindasan serius). Plaintif memulakan tuntutan kecuaian perubatan di Mahkamah Tinggi terhadap perayu-perayu ('defendan-defendan') atas alasan defendan-defendan gagal (i) mematuhi tatacara operasi standard ('SOP') berkenaan pemindahan darah yang diamalkan di semua hospital Kerajaan;

(ii) mengambil langkah-langkah perlu untuk memastikan darah yang digunakan dalam pemindahan darah selamat dan bebas HIV; (iii) memberi rawatan awal kepada si mati apabila HIV dikesan dalam badannya untuk mengawal penyakit dalam badannya yang menyebabkan kematiannya iaitu AIDS. Defendan-defendan menafikan dakwaan-dakwaan plaintif dan dalam menyokong pembelaan mereka, memanggil pakar-pakar perubatan yang memberi keterangan, antara lain, bahawa (i) SOP berkenaan pemindahan darah yang diamalkan di hospital-hospital Kerajaan telah dipatuhi; (ii) penderma-penderma darah bebas virus HIV; (iii) HIV boleh dijangkiti melalui pelbagai cara dan tidak semestinya melalui pemindahan darah; dan (iv) peralihan daripada jangkitan HIV ke AIDS, secara puratanya, ialah lapan hingga sepuluh tahun walaupun boleh jadi lebih pendek dalam kes melibatkan kanak-kanak. Hakim Mahkamah Tinggi ('HMT') membenarkan tuntutan plaintif berdasarkan dapatan bahawa prosedur pemindahan darah pada 12 Mei 2004 tidak selamat kerana terdapat percanggahan tarikh. Defendan-defendan menyatakan bahawa tarikh beg darah No. A/008108 ('beg darah') diguna ialah 12 Mei 2004 tetapi laporan bank darah ('P7') menunjukkan beg darah diterima pada 14 Mei 2004. Percanggahan ini, ditambah dengan pengakuan defendan-defendan bahawa pernah berlaku kesalahan melabel, membangkitkan keraguan sama ada darah dalam beg darah atau darah orang lain telah diguna bagi pemindahan darah pada 12 Mei 2004. Maka timbul rayuan ini. Defendan-defendan menghujahkan bahawa HMT terkhilaf dalam memutuskan virus HIV yang dijumpai dalam badan si mati adalah akibat prosedur pemindahan tidak selamat yang dijalankan padanya pada 12 Mei 2004.

Diputuskan (membenarkan rayuan)
Oleh Lim Yee Lan HMR menyampaikan penghakiman mahkamah:

(1) Plaintif tidak mengemukakan apa-apa keterangan perubatan daripada seorang pakar untuk membantu mahkamah memutuskan soalan-soalan kompleks seperti (i) mana satu SOP berkenaan pemindahan darah di hospital-hospital Kerajaan yang defendan-defendan tidak patuhi; (ii) hal-hal keadaan yang boleh menyebabkan seseorang menjangkiti virus HIV; (iii) bila jangkitan HIV boleh menyebabkan AIDS; dan (iv) sama ada jangkitan HIV boleh dirawat jika diberi rawatan awal apabila seorang pesakit mempunyai masalah kesihatan seperti dalam kes ini. Oleh itu, plaintif tidak boleh dikatakan berjaya melepaskan beban perundangan dan pembuktiannya atau membuktikan bahawa virus HIV dalam badan si mati berakibat langsung daripada pemindahan darah dan bahawa dia meninggal dunia akibat AIDS.

(2) Hakim Mahkamah Tinggi terkhilaf dalam memutuskan pemindahan darah pada 12 Mei 2004 tidak selamat. Defendan-defendan telah, lebih daripada cukup, melepaskan beban pembuktian mereka dengan mengemukakan keterangan yang boleh dipercayai dan meyakinkan

bahawa (i) pemindahan darah yang dijalankan pada 12 Mei 2004 mematuhi SOP berkenaan pemindahan darah yang diamalkan di hospital-hospital Kerajaan; (ii) darah yang diguna dalam pemindahan darah telah melalui ujian HIV dan lain-lain penyakit berjangkit; dan (iii) darah tersebut bebas virus HIV.

(3) Hakim Mahkamah Tinggi sama sekali tidak mempedulikan tarikh-tarikh yang tertera pada P7 yang menunjukkan keselarasan bahawa ujian darah dalam beg berlaku pada 10 Mei 2004 dan bukan 14 Mei 2004. Tarikh-tarikh ini tertera pada (i) bahagian bawah borang iaitu di sebelah perkataan 'Tarikh/Masa Terima', tertulis tarikh '10 Mei 2004' dan 'Keputusan disahkan oleh: …' dan di sebelah perkataan 'Tarikh', tertulis tarikh '11 Mei 2004'; (ii) bahagian kanan atas P7, di bawah perkataan-perkataan 'Makmal Ujian Saringan', di sebelah perkataan-perkataan 'Tarikh Ujian Dijalankan', tertulis tarikh '10 Mei 2004'; dan (iii) bahagian kanan bawah borang, di sebelah perkataan-perkataan 'Keputusan diterima oleh', terdapat cop getah dengan nama 'Hasmah bt Ismail' dan di sebelah perkataan-perkataan 'Tarikh & masa diterima' tertulis tarikh '11 Mei 2004'.

(4) Hakim Mahkamah Tinggi gagal mempertimbangkan bahawa, selain P7, terdapat rekod-rekod/dokumen-dokumen semasa berkaitan pemindahan darah pada 12 Mei 2004 yang menunjukkan darah yang diguna dalam pemindahan darah pada 12 Mei 2004 datang dari beg darah dan telah melalui ujian virus HIV pada 10 Mei 2004. Maklumat pada penanda beg darah selaras dengan maklumat pada kad pesakit si mati yang merekodkan pemindahan darah dilakukan pada 12 Mei 2004.

(5) Sijil kematian si mati menyatakan sebab kematiannya adalah abses otak (dengan jangkitan HIV dan imunotindasan serius). Tiada bedah siasat dijalankan atas si mati untuk menentukan sebab sebenar kematian. Keputusan HMT bahawa sebab kematian adalah AIDS dan bukan masalah kesihatan si mati, tanpa apa-apa keterangan perubatan, adalah tekaan yang, sebagai seorang hakim bicara, tidak boleh beliau lakukan.

(6) Berdasarkan Borang Pendaftaran Penderma Darah, keputusan ujian darah bagi HIV dalam beg darah yang diguna untuk pemindahan pada 12 Mei 2004 tidak reaktif. Selepas pemindahan darah pada 12 Mei 2004 menjadi isu, pendermanya dipanggil semula untuk menjalani ujian HIV dan keputusan ujian menunjukkan dia bebas HIV.

(7) Tiada fakta objektif yang daripadanya boleh disimpulkan, sebagai hal perkara kemungkinan munasabah, bahawa si mati meninggal dunia akibat AIDS. Tempoh antara jangkitan awal HIV dengan kematiannya pada 28 Ogos 2009 ialah lima tahun. Tempoh gestasi dari jangkitan HIV ke AIDS adalah antara lapan hingga sepuluh tahun. Ini membangkitkan

persoalan sama ada tempoh am peralihan daripada HIV ke AIDS antara lapan hingga sepuluh tahun boleh diubah atau dipercepatkan oleh masalah kesihatan si mati. Soalan sedemikian hanya boleh dijawab oleh pakar perubatan HIV/AIDS yang, dalam kes ini, tidak dikemukakan.

Case(s) referred to:
Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur [2014] 9 CLJ 861 FC ***(refd)***
Cassidy v. Ministry of Health [1951] 1 All ER 577 ***(refd)***
Caswell v. Powell Duffryn Associated Collieries Ltd [1940] AC 152 ***(refd)***
Foong Yeen Keng v. Assunta Hospital (M) Sdn Bhd [2006] 1 CLJ 608 HC ***(refd)***
Hong Chuan Lay v. Dr Eddie Soo Fook Mun [1998] 5 CLJ 251 HC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Lloyde v. West Midlands Gas Board [1971] 1 WLR 749 ***(refd)***
Mahon v. Osborne [1939] 2 KB 14 ***(refd)***
Payremalu Veerappan v. Dr Amarjeet Kaur & Ors [2001] 4 CLJ 380 HC ***(refd)***
Saminathan v. Pappa [1980] 1 LNS 174 PC ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 SC ***(refd)***
Sundram Ramasamy v. Arujunan Arumugam & Anor [1994] 4 CLJ 300 SC ***(refd)***
Teoh Guat Looi v. Ng Hong Guan [1998] 4 CLJ 416 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 74(a)(iii), 101, 102, 114(e)

For the appellants - Mohd Radhi Abas & Cynthia Haizean; FC
For the respondent - Azwan Abdul Wahab; M/s Kartika & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: MT(2) 22NCVC-98-07-2012 (overruled).]

Reported by Najib Tamby

JUDGMENT

Lim Yee Lan JCA:

Introduction

[1] This is an appeal against the decision of the learned judge of the High Court of Malaya in Kota Bahru, in allowing the respondent's claim against the appellants in a medical negligence suit.

[2] For ease of reference, the respondent will be referred to as the plaintiff and the appellants, the defendants.

Salient Facts

[3] On 5 April 2004, the plaintiff's then seven year old daughter (the deceased), sought treatment at the Kota Bahru Hospital. On 7 April 2004, she was transferred to the Hospital Raja Perempuan Zainab II (HRPZII) where she was diagnosed with chronic rheumatic heart disease with severe mitral regurgitation and began to receive treatment for that condition.

[4] Between the period 7 April 2004 until 27 October 2004, the deceased was admitted to the HRPZII and Hospital Gua Musang (HGM) on several occasions for complaints related to her medical condition and was given various treatments in the paediatric ward of the hospitals.

[5] On 27 October 2004 the deceased was discharged from HGM after her condition was found to be stabilised.

[6] On 16 June 2009, after an absence of five years, the deceased was re-admitted to the HGM for her fever and coughing which had lasted for a month. The deceased was diagnosed as having bronchopneumonia and was given due treatment and a TB test conducted on her turned out to be negative.

[7] The deceased was discharged from the HGM on 24 June 2009. However, on 15 July 2009, the deceased again sought treatment at the HGM for her fever which lasted for two weeks and upon examination she was found to be suffering from dehydration, oral thrush, low white blood cells and heart murmur and an x-ray examination showed enlargement of the heart. A repeat TB test conducted on her was again found to be negative. The deceased was again given the necessary treatment for her conditions.

[8] On 23 July 2009, the deceased was transferred from the HGM to the HRPZII for further treatment after her condition failed to improve.

[9] At the HRPZII the deceased was found to be suffering from oral thrush, although all her organs and vital signs were found to be normal. An x-ray test on the deceased found patchy opacities in the left lung and she was treated with intravenous antibiotic.

[10] On 26 July 2009 the deceased experienced headache and vomiting continuously and on 28 July 2009 she complained of blurred vision and vertigo. On 3 August 2009, the deceased underwent a CT scan of her brain and was found to have "hypodense lesion" in the cerebellum which indicated ischemia, demyelination or cerebellitis.

[11] Due to her prolonged illness and oral candidiasis, the doctors at the HRPZII decided to conduct immunisation tests on the deceased for HIV Elisa, which were carried out on 28 July 2009 and 18 August 2009. Both test results indicated she was positive for the Human Immunodeficiency Virus (HIV) where CD4 was 8(2%) and CD8 was 143 (40%).

[12] Similar HIV tests were conducted on the plaintiff and his wife on 23 August 3009 and the results turned out to be HIV non-reactive.

[13] On 25 August 2009, the deceased's condition deteriorated further where she experienced extreme headache and went into a coma shortly after. The deceased passed away on 26 August 2009 at the HRPZII and the cause of death on her death certificate was stated as "brain abscess (with underlying HIV infection and severe immunosuppression)".

[14] It was not disputed that during her treatment at the HGM and HRPZII, the deceased received blood transfusions on five occasions, ie, 12 May 2004, 24 June 2004, 19 June 2009, 25 July 2009 and 17 August 2009.

[15] On 23 November 2009 the plaintiff lodged a police report alleging that his daughter's death was due to the negligence of the defendants during her treatment at the HGM and HRPZII.

[16] On 30 May 2012 the plaintiff through his solicitor sent a notice of demand to the defendants for compensation for his daughter's death but did not receive any response from the defendants.

[17] On 11 July 2012 the plaintiff filed the present action against the 23 defendants.

Particulars Of Negligence Pleaded

[18] In his amended statement of claim the plaintiff cited, *inter alia*, the following particulars of negligence:

(i) the defendants failed to comply with the standard safety procedures (SOP) practised in all Government hospitals relating to blood transfusions;

(ii) the defendants failed to take necessary measures to ensure that the blood used in the deceased's blood transfusion was safe;

(iii) the defendants failed to ensure that the blood used in the blood transfusion was free from HIV and other infectious viruses;

(iv) the defendants failed to give early treatment to the deceased upon detection of the HIV in her body to contain the disease which led to her death from AIDS;

(v) The plaintiff also pleads the doctrine of *res ipsa loquitur*.

Reliefs Sought

[19] In his suit, the plaintiff seeks special and general damages, including exemplary and aggravated, in the sum of RM3 million for loss of his and his family's reputation, physical and mental distress and shame associated with the death of his daughter from AIDS.

Defence

[20] The defendants vigorously denied any negligence on their part and in their defence pleaded, *inter alia*, that the defendants had complied with the SOP as practised in all government hospitals relating to blood transfusions; that all the blood used in the deceased's blood transfusions had been screened for HIV and other infectious diseases before the transfusions; that the donors

to the deceased's five blood transfusions were recalled after her death for test in 2009 and all were found to be HIV negative and that repeat test in 2013 found them to be still HIV negative; that the plaintiff's claim was time-barred under s. 2(f) of the Public Authorities Protection Act 1948.

Agreed Issues At The High Court

[21] During the trial, parties had agreed to narrow down the issues to be tried to the following three questions:

(a) Whether the HIV found in the body of the deceased was caused by blood transfusion procedures that were unsafe;

(b) Whether the plaintiff's claim was barred by limitation;

(c) Whether the defendants were liable to the plaintiff for general and special damages.

Witnesses

[22] During the trial the plaintiff testified as SP1 and was the only witness for the plaintiff. The defendants, on the other hand, called six witnesses (SD1 to SD6) to prove their defence. SD5, Head of the Hematology and Blood Services, Pathology Division of HRPZII and SD6, the Specialist Consultant on Blood Analysis at the National Blood Bank, testified as expert witnesses.

Decision Of The High Court

[23] After a full trial, the learned judge answered all the three issues in favour of the plaintiff, in consequence of which he allowed the plaintiff's claim for damages the quantum of which to be assessed by the court on a later date.

[24] In essence, the learned judge in his judgment found that the deceased's death was due to the negligence of the defendants collectively (because he did not identify which defendant was negligent) in (1) causing the deceased to be infected with the HIV virus through unsafe blood transfusion procedure, specifically the one carried out on 12 May 2004, (2) not screening the deceased for the HIV virus before and after the blood transfusion procedures which could have helped to detect the HIV virus early and she could have been given early treatment for her HIV infection.

[25] In particular, the learned judge had made the following specific findings of facts:

(a) Even though HIV infection can be caused by sharing of needles in intravenous drug use and unprotected random sexual intercourse, judging from her age and the fact that her parents were HIV negative, there could be no other cause for the deceased's HIV infection except through the blood transfusion procedures she underwent at the Defendants' hospitals (Diteliti dari umur plaintif dan juga kedua-dua ibu bapanya bebas HIV maka pendedahan kepada jangkitan HIV ini

mahkamah ini putuskan hanya boleh berlaku melalui pemindahan darah, walaupun HIV boleh berlaku dari punca lain yang sangat remote untuk plaintif terlibat seperti jarum suntikan dadah atau hubungan kelamin yang rambang dan kerap);

(b) The deceased's HIV infection was caused by the blood transfusion carried out on her on 12 May 2004 because based on the Report of the Blood Bank of the Kota Bharu Hospital (D7) the blood in bag No. A/008108 (which was allegedly used in that transfusion) was screened for the HIV virus only on 14 May 2004, which was two days after the transfusion. This raised a doubt as to whose blood was actually used in that transfusion on 12 May 2004 (...'D7' catatan darah yang dilabelkan padanya darah tersebut diterima oleh Tabung Darah di HRPZ II pada 14 Mei 2004 dan ujian saringan pada 14 Mei 2004 iaitu selepas tarikh pemindahan dilakukan ke atas si mati pada 12 Mei 2004. Oleh itu timbul tanda tanya darah siapakah yang dimasukkan ke dalam badan si mati pada 12 Mei 2004 itu kerana darah nombor rujukan AD 08108 hanya diterima oleh Tabung Darah HRPZ II untuk saringan hanya pada 14 Mei 2004);

(c) The deceased's death was due to the negligence of the defendants in not screening her for the HIV virus before the blood transfusion was carried out and had they done so the HIV virus could have been detected earlier and the deceased could have been given early treatment in tandem with her underlying medical condition (saya memutuskan bahawa pihak defendan-defendan adalah cuai dan menyebabkan kematian si mati (Tik Syariah binti Abdullah) di mana pihak defendan/defendan-defendan sepanjang rawatan lapan tahun ke atas plaintif gagal membuat ujian ke atas plaintif sama ada dijangkiti kuman HIV pada darah beliau sehinggalah saat akhir sebelum kematian ... Ujian darah untuk mengesan HIV hanya dibuat pada 28 Ogos 2009, iaitu begitu lewat dan diketahui hanya pada 18 Ogos 2009 iaitu 14 hari selepas itu plaintif meninggal dunia (26 Ogos 2009) ... jika ujian HIV dibuat ke atas plaintif pada awal lagi sudah tentu rawatan boleh bertumpu kepada memulihkan jangkitan HIV AIDS juga ...);

(d) The court was satisfied that the deceased died from HIV infection and not due to her medical condition, chronic rheumatic heart disease with severe mitral regurgitation (Saya berpuas hati bahawa plaintif meninggal bukan disebabkan oleh sakit beliau yang dirawat sebenarnya iaitu acute rheumatic carditis with severe mitral regurgitation ... mahkamah memutuskan pihak defendan-defendan bertanggungan cuai atas kematian si mati oleh sebab si mati meninggal dunia akibat dari jangkitan virus HIV bukannya sakit jantung atau 'acute rhematic carditis with severe mitral regurgitation").

A **The Appeal**

[26] We heard the appeal on 4 September 2014. Before us, learned Senior Federal Counsel (SFC) on behalf of the defendants raised only one issue in his submission, which is that the learned judge erred in holding that the HIV virus found in the body of the deceased was due to the unsafe blood
B transfusion procedure carried out on her on 12 May 2004.

Decision Of This Court

[27] At the appeal, after hearing submission of the learned SFC for the defendants and learned counsel for the plaintiff and having carefully perused
C the record of appeal, we unanimously allowed the appeal and delivered the following brief grounds of judgment:

> There was only one issue before this Court in this medico-legal trial namely whether the HIV virus found in the body of the deceased was caused by the blood transfusion procedure that was unsafe.
>
> D It is also not in dispute that the transfusion in issue is that conducted on 12.5.2004.
>
> Central to this issue and the finding of the learned Judge is this transfusion and the report (P7) issued by the Blood Bank laboratory of Hospital Kota Bahru. There is one inconsistency in the dates that is
> E apparent on the face of the document. All the other dates on the document are consistent with the blood having been duly tested and certified as safe prior to the transfusion on 12.5.2004. This is confirmed by the patient card which particularizes both the date and time of the transfusion.
>
> F Premised on this one issue the learned Judge concluded that it had been proven on a balance of probabilities that the deceased was infected with AIDs as a consequence of the negligence of the Defendants.
>
> We find that this conclusion is not supported by the evidence adduced by the plaintiff. In short the plaintiff has failed to discharge the burden upon him to establish that the contracting of AIDs was directly due to
> G the blood transfusion on 12 May 2004 or that such transfusion was infected with HIV virus. On the contrary the defendants have adduced sufficient evidence to show that there was no such negligence.
>
> Therefore the appeal is allowed and the order of the High Court is set aside. Since the respondent is not seeking costs, we therefore make no
> H order as to costs.

[28] We now give the detailed rationale for our decision.

Evidence Of The Plaintiff

[29] As stated earlier, the only witness for the plaintiff's case was the father
I of the deceased, who testified as SP1.

[30] The gist of SP1's rather brief testimony is as follows. In his evidence in chief SP1 stated that since her birth until she reached six years of age, the deceased had never been admitted to any hospital for any serious illness (Q&A 7 WS-SP1); on her first admission into the Gua Musang hospital on 5 April 2004, he was told that his daughter had a heart problem and needed to be warded at the Hospital Raja Perempuan Zainab II for further treatment (Q&A 12 p. 61); his daughter received blood transfusions at the Gua Musang and HRPZ II (Q&A 18 and 26); he was informed by the doctors that his daughter had AIDS and he and his wife were made to undergo HIV tests but were found to be HIV negative (Q&A 34 and 36); the doctors told him the cause of his daughter's death was AIDS (Q&A 38); throughout her treatment at the hospitals the doctors never told him that his daughter had AIDS until one week before her death (Q&A 42); the deceased did not undergo any blood transfusion in any other hospital except the GMH and HRPZ II (Q&A 42).

[31] During his cross-examination by learned SFC, when asked to describe the negligence he complained of against the doctors at the HRPZ II, SP1 answered "cuai, anak dijangkiti HIV" (Q&A 4); he agreed that the negligence most probably happened in 2004 (Q&A 7); and that the blood transfusion was to treat his daughter's heart condition (Q&A 10).

[32] During his re-examination by his counsel, SP1 stated that his daughter suffered from "gatal-gatal" and "kudis-kudis" after the blood transfusions (Q&A 1); he was only informed that his daughter had HIV one week before her death (Q&A 3) and the HIV infection occurred after her blood transfusions (Q&A 4).

[33] We bear in mind that this is a medical negligence suit. In *Payremalu Veerappan v. Dr. Amarjeet Kaur & Ors* [2001] 4 CLJ 380 "It was important for the plaintiff to have adduced medical or expert evidence to support his allegations against the defendants to assist the court in arriving at its decision. Unfortunately, no such evidence was given." (cited to us by learned SFC) VT Singham JC (as he then was) held that while there is no legal requirement that medical evidence is required in order to establish a medical negligence case, the court was of the view that the testimony of a medical expert would have been most material to the issue of causation and it was important for the plaintiff to have adduced medical or expert evidence to support the allegations contained in the statement of claim against the defendants and this could have also assisted the court or thrown some light in arriving at its decision but unfortunately there was no such evidence before the trial court. His Lordship also cited the case of *Hong Chuan Lay v. Dr Eddie Soo Fook Mun* [1998] 5 CLJ 251 in which James Foong J (as he then was) has also stressed the importance of medical evidence in a medical negligence suit especially on the issue of causation.

[34] In this case, the plaintiff did not adduce any medical evidence of an expert to assist the High Court in determining complex questions such as which of the SOP relating to blood transfusion in Government hospitals had been breached by the defendants, the circumstances under which a person can be infected with the HIV virus, when an HIV infection can lead to full blown AIDS and whether HIV infection could be treated if given early treatment in the case of a person having an underlying medical condition as in the case of the deceased.

[35] Bereft of any medical evidence, the plaintiff could not be said to have discharged his legal and evidential burden of proving that the HIV virus in his daughter's body was directly due to the blood transfusion carried out on 12 May 2004 and that she died from AIDS (see ss. 101, 102 of Evidence Act; *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 (SC); *Sundram Ramasamy v. Arujunan Arumugam & Anor* [1994] 4 CLJ 300 SC; *Saminathan v. Papa* [1980] 1 LNS 174; [1981] 1 MLJ 121).

[36] Learned counsel for the plaintiff, however, in his submission, sought to impress upon us that the plaintiff had also relied upon the doctrine of *res ipsa loquitur* to prove his case. Under this doctrine, it was submitted, all the plaintiff had to do was to establish certain facts to show that but for the negligence of the defendants, the injury (infection with the HIV) would not have occurred.

[37] In this case, the plaintiff had established the following facts:

(a) The deceased had no serious illness before she was admitted to the defendants' hospitals in 2004;

(b) The deceased had undergone five blood transfusions at the defendants' hospitals;

(c) The deceased was confirmed to have contracted HIV following two tests on 28 July 2009 and 18 August 2009;

(d) Her parents had also been tested for HIV and were found to be HIV free; and

(e) The undeniable fact was that the deceased went into the defendants' hospitals without any major illness but came out dead from HIV infection.

[38] It was submitted that with the establishment of the aforementioned facts by the plaintiff, the burden was then shifted to the defendants to prove that the deceased's HIV infection was not due to their negligence, which the learned judge had rightly held they had failed to do so.

Doctrine Of *Res Ipsa Loquitur*

[39] In *Teoh Guat Looi v. Ng Hong Guan* [1998] 4 CLJ 416 at 421 NH Chan JCA quoted the case of *Lloyde v. West Midlands Gas Board* [1971] 1 WLR 749 in which Megaw LJ describes *res ipsa loquitur* as such:

> In *Lloyde v. West Midlands Gas Board* [1971] 1 WLR 749, Megaw LJ describes *res ipsa loquitur* as in essence no more than a common sense approach to the effect of the evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where: (i) it is not possible for him to prove precisely how the accident happened, but (ii) on the evidence as it stands he manages to show that the accident could not have happened without negligence on the part of the defendant. ...
>
> See also *Bennett v. Chemical Construction (GB) Ltd* [1971] 1 WLR 1571, 1575, where Davies LJ put it more succinctly, thus:
>
> > In my view it is not necessary for that doctrine to be pleaded. If the accident is proved to have happened in such a way that *prima facie* it could not have happened without negligence on the part of the defendants, then it is for the defendants to explain and show how the accident could have happened without negligence.

[40] The doctrine was further explained by the Federal Court in the case of *Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur* [2014] 9 CLJ 861 through Raus Shariff PCA, as such:

> [8] It was held that the 'fundamental basis of the maxim (*res ipsa loquitur*) is that the rule that it is for the plaintiff to prove negligence and not for the defendant to disprove it, may cause hardship to the plaintiff if it is impossible for him to know what precise acts of omission led to his damage, and this is most obviously so where the cause of the damage is peculiarly within the means of knowledge of the defendant who caused it. This hardship can sometimes be avoided by the application of the maxim *res ipsa loquitur*. (See: *MA Clyde v. Wong Ah Mei & Anor (supra)*. It should also be noted that the doctrine is not a rule of substantive law but rather a principle of evidence. The doctrine of *res ipsa loquitur* does not prove negligence. It only infers the negligence. And the doctrine does not apply when a defendant did not have exclusive control over the property or object that alleged to have caused the damage or injury. Indeed it is insufficient for a plaintiff merely to present evidence of defendant's negligence. A plaintiff must show that the type of injury suffered would not ordinarily occur unless the defendant was negligent.

[41] Question has also arisen as to whether the doctrine applies to a medical negligence case. This came up for consideration in the case of *Foong Yeen Keng v. Assunta Hospital (M) Sdn Bhd* [2006] 1 CLJ 608 in which Raus Sharif JCA (as he then was), relying on the English case of *Cassidy v. Ministry of Health* [1951] 1 All ER 577 and *Mahon v. Osborne* [1939] 2 KB 14, held that "whether the maxim *res ipsa loquitur* is applicable or not in a medical negligence case depends upon whether in the circumstances of the particular case, the mere fact of the occurrence which cause hurt or damage is a piece of evidence relevant to infer negligence ... Where complete control rests with the defendant and it is the general experience of mankind that the accident in question does not happen without negligence, the maxim may well apply".

[42] Applying the law on *res ipsa loquitur* as discussed above to the facts of this case, we have no hesitation in agreeing with learned counsel for the plaintiff that the doctrine on *res ipsa loquitur* might well apply to this case. This is because it cannot be disputed by the defendants that complete control of the procedure for screening of blood for transfusion purposes rests with them and as an outsider it would be difficult, if not impossible, for the plaintiff to prove in what manner the defendants were negligent during the process of the blood transfusion. Hence, once the plaintiff had proven the fact of the presence of the HIV virus in the deceased's body as confirmed by the two tests conducted on 28 July 2009 and 18 August 2009, the burden is then shifted to the defendants to prove that the blood transfusion procedures carried out on the deceased, especially the one on 12 May 2004, were safe in that they had complied with the SOP in government hospitals relating to blood transfusions and the blood used in those transfusions had been screened and found to be free from the HIV virus.

Defendants Had Discharged Their Evidential Burden

[43] Be that as it may, it is our considered view that even assuming that the doctrine of *res ipsa loquitur* applies in this case, the defendants had nevertheless succeeded in discharging their evidential burden of proof that the blood transfusion on 12 May 2004 was safe and there was no negligence on their part. We say so for the following reasons.

[44] During the trial, the defendants had called a total of six witnesses (SD1-SD6) to prove their pleaded defence.

[45] In particular, SD5 and SD6 had testified as follows:

(i) The defendant hospitals had complied with the SOP relating to blood transfusion practiced in all government hospitals, one of which was that all blood used for the transfusion must be screened for the HIV and other infectious viruses before the procedure;

(ii) Based on the report of the Blood Bank of Hospital Kota Bahru (P7) and the deceased's patient call card (P9), the blood used in the blood transfusion on 12 May 2004 came from bag No. A/008108 and the blood was screened for HIV virus on 10 May 2004 and the transfusion was carried out on 12 May 2004;

(iii) All the blood donors for the five blood transfusions had been traced and their medical reports indicated that they were free of HIV virus in 2004 and 2009;

(iv) Repeat tests done on these donors in 2010 and 2013 showed they were still free of the HIV virus;

(v) The donor of the blood in bag No. A/008108 was Ab Halim bin Ali whose blood test in 2004 showed he was free from HIV virus. Repeat HIV tests were done on this donor because he continued to donate blood after May 2004 and his latest blood test on 3 October 2013 (a few days before the trial commenced) all confirmed that he was HIV free;

(vi) Screening for HIV virus was not conducted on the deceased on her first admission in 2004 because she did not show any symptoms of HIV infection;

(vii) It is not the practice of Government hospitals in this country to screen recipients of blood transfusions for HIV virus except for regular recipients such as Thalassemia patients;

(viii) HIV virus could be contracted through various means and not necessarily through blood transfusion and progression from HIV infection to AIDS on the average is around eight - ten years, although it can be shorter in the case of a child, and diagnosis requires a doctor with the specialised skill in that area.

[46] However, as evident from his grounds of judgment, the learned judge had completely ignored or failed to consider the defendants' aforementioned evidence in arriving at his findings and conclusions.

[47] Indeed, as we had indicated in our brief grounds of judgment, the entire basis of the learned judge's finding that the blood transfusion procedure on 12 May 2004 was unsafe was centred on the one particular date found on P7 (at A.R. Jld2(9) p. 1290), where at the top section of the form, beneath the words "Penerimaan di Tabung Darah, HKB, next to the words "Tarikh/ Masa di terima" was written the date '14 May 2004'. Premised on this notation alone, the learned judge concluded that the blood in bag No. A/008108, which the defendants claimed was used in the blood transfusion on 12 May 2004, was received by the Blood Bank only on 14 May 2004, which could only mean that the blood in bag No. A/008108 was screened after the date of the transfusion on 12 May 2004, which was a clear breach of the SOP in Government hospitals which required all blood to be screened for HIV before blood transfusion.

[48] The learned judge opined that this discrepancy in the date of screening on P7, coupled with the admission of SD6 that mistakes in labeling did occur in the past under the manual system of recording, gave rise to a doubt as to whether the blood in bag No. A/008108, or some other person's blood, had been used in the blood transfusion on 12 May 2004.

[49] Now we observed that in coming to this conclusion, the learned judge had totally ignored three other dates found on P7, which showed that it was more consistent that screening of the blood in bag No. A/008108 took place on 10 May 2004 rather than on 14 May 2004. These dates appeared (i) at

the bottom section of the form where next to the words "Tarikh/Masa Terima was written the date "10 May 2004" and "Keputusan disahkan oleh: (name illegible) and next to the word "Tarikh" was written the date "11 May 2004"; (ii) the top right section of P7 where beneath the words Makmal Ujian Saringan, next to the words "Tarikh ujian dijalankan" was written the date "10 May 2004" and (iii) at the bottom right section of the form where next to the words "Keputusan diterima oleh" was a name in rubber stamp "Hasmah bt. Ismail" and next to the words "Tarikh & masa diterima" was written the date "11 May 2004".

[50] The learned judge also failed to consider that quite apart from P7, there were other contemporaneous records/documents before the court relating to the blood transfusion on 12 May 2004, which unequivocally showed that the blood used in the blood transfusion on 12 May 2004 was from the bag No. A/008108 and the bag was screened for HIV virus on 10 May 2004.

[51] These documents were (i) the tag of bag No. A/008108 marked as P9 (see A.R. Jld 2(9) p. 1290) and (ii) the deceased's patient call card marked as P8 (see A.R. Jld 2(5) p. 657).

[52] In the case of P9 on the front of the tag under the caption "IMPORTANT" was entered the following information:

Bottle No: A/008108
Group A amount 200cc
Matched with 6640
Tik Syariah Abdullah (deceased's name)
Date taken 6/5
Date issued 12 May 2004
Not to be used after 11/6

And on the reverse side of the tag under the caption "Recipient", the following information appeared:

(i) Patient's Group A

(ii) Given by Dr. Raba'aladawiya Zainal, Pegawai Perubatan;

(iii) Time started: 12.30pm;

(iv) Time completed 4.00pm

(v) Result: Good

(vi) Amount given: 195cc.

[53] The information on P9 tallied with the information on the deceased's patient call card (P8) where it was recorded that the blood transfusion was carried out on 12 April 2005 and the blood came from bag No: A/008108 and it started at 12.30pm and ended on 4.30pm and was checked by Dr Raba'aladawiya and witnessed by SN Rosmiza.

[54] SD5 in her testimony had also clarified that based on Borang Pendaftaran Penderma Darah (A.R. Jld 2(9) p. 1304) the blood in bag No. A/008108 was traced to a man named Ab Halim b. Ali with I.C. No 61011203-5157 whose blood type was A and who had donated the blood on 6 May 2004. Ab Halim b. Ali had also donated blood on two subsequent occasions, on 5 February 2009 (bag No. A91603128) (see A.R Jld 2(9) p. 1322) and on 2 July 2009 (see bag No. A1604411) (same A.R p. 1323) in which the blood tests results for HIV were non-reactive (NR).

[55] According to SD5, after the blood transfusion on 12 May 2004 became an issue, Ab Halim b. Ali was recalled for a HIV test on 3 October 2013 and the test result again showed he was free of the HIV virus (see A.R. Jld 2(9) p. 1315).

[56] Both SD5 and SD6 had also explained that the date '14 May 2004' at the top centre section of P7 was a clerical mistake while the figure '14' on the top right section of P7 if read carefully was actually the figure '10' (see notes of proceedings at A.R. Jld 2(2) pp. 30-35 (SD5); pp. 39-58 (SD6)).

[57] There was no serious challenge to the testimony of SD5 and SD6 by the plaintiff. The learned judge had purported to dismiss SD5's and SD6's evidence on the ground that if any explanation was to be given on the discrepancy in the screening date on P7, it should come from the various signatories in the relevant columns of the document and not SD5 and SD6. We were unable to agree with him. It is clear that P7, P8 and P9 formed part of the official records/documents of the defendant hospitals. Section 74(a)(iii) of the Evidence Act 1950 defines "public documents", *inter alia*, as documents forming the acts or records of Federal or State public officers. Section 78 states, *inter alia*, that public documents constituting the acts of any Federal or State Government department may be proved by the records of the departments certified by the heads of those departments respectively. It cannot be denied that SD5 and SD6 were heads of their respective divisions/departments in the defendant hospitals.

[58] Section 114(e) of the Evidence Act 1950 further states that the court is entitled to take judicial notice that an official act has been regularly performed. Section 114(e) reads as follows:

> The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume:
>
> ...
>
> (e) that judicial and official acts have been regularly performed;

[59] In the light of the various provisions in the Evidence Act 1950, we were of the considered view that SD5 and SD6 were more than competent to testify on the contents in P7, P8 and P9.

[60] The learned judge had also purportedly rejected SD5's and SD6's evidence on the donors on the ground that even if they were found to be HIV free, the fact remains that SD6 had admitted (during cross-examination) that mistakes in labeling of blood by the blood bank at government hospitals had occurred before under the manual system of recording (the use of bar code system of labeling blood bags was only introduced in 2009), and it was not impossible that there could have been an accidental switch of blood during the blood transfusion on 12 May 2004.

[61] In this respect we found the judge's reasoning seriously flawed. SD6's evidence that mistakes can occur during blood transfusion procedures were in response to general questions asked by learned counsel for the plaintiff during his cross-examination which read as follows:

> S: Boleh Dato Beritahu mahkamah, sepanjang 27 tahun berkhidmat pernah ke berlaku kesilapan dalam proses pemindahan darah. Cara darah A ke B atau tidak mengikut SOP?
>
> J: Pernah berlaku.
>
> S: Sebagai conclusion ia boleh berlaku kesilapan dato setuju atau tidak?
>
> J: Human error boleh berlaku.

[62] During their re-examination, SD5 and SD6 had reiterated that the blood used in the transfusion on 12 May 2004 came from bag No. A/008108 which belonged to the donor Ab Halim b. Ali and the blood was tested on 10 May 2004 for HIV and found to be non-reactive.

[63] In the light of our foregoing analysis of the evidence adduced by the defendants before the High Court, we were of the considered view that the defendants had more than sufficiently discharged their burden of proof by adducing credible and convincing oral and documentary evidence to show that (i) the blood transfusion carried out on 12 May 2004 complied with the standard operating procedure practised in all Government hospitals relating to blood transfusion; (ii) the blood used in that transfusion was from the bag No. A/008108 which was screened for HIV and other infectious diseases on 10 May 2004, a date before the date of the transfusion on 12 May 2004; and (iii) the blood in bag No. A/008108 was free from the HIV virus.

[64] The learned judge therefore erred in holding that the blood transfusion on 12 May 2004 was unsafe. Quite apart from his erroneous finding on the blood transfusion carried out on 12 May 2004, we also found the learned judge's finding that "si mati meninggal dunia akibat dari jangkitan virus HIV

bukannya sakit jantung atau 'acute rheumatic carditis with severe mitral regurgitation" was an erroneous inference in the absence of any medical evidence to that effect.

[65] In *Sundram Ramasamy, supra*, Edgar Joseph Jr SCJ at 310 had quoted Lord Wright in *Caswell v. Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 169 on what amounts to "inference":

> Inferences must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

[66] In this case, the deceased's death certificate states the cause of death As "Brain Abscess (With Underlying Hiv Infection And Severe immunosuppression)". No post mortem was conducted on the deceased to determine the actual cause of death. As we had stated earlier, no medical evidence was called by the plaintiff to establish the connection between the HIV virus in the deceased's body and the actual cause of death. Hence the learned judge's pronouncement that the cause of death was AIDS and not the underlying condition the deceased was suffering from was, in the absence of any medical evidence, a pure conjecture or guess which as a trial judge he was not entitled to make.

[67] We also noted that even if the deceased had contracted HIV virus in 12 May 2004 blood transfusion, the period between her initial infection with HIV and her death on 28 August 2009 was five years (and not eight years as erroneously found by the learned judge).

[68] SD5 and SD6 had testified that the gestation period from HIV infection to AIDS is between eight-ten years. The internet is also replete with publications of official bodies and organisations (see "UNESCO Herare Cluster Office – Virtual Institute of Higher Education in Africa HIV/AIDS Education" (www.ibe.unesco.org) and the "US National Library of Medicine, Nasional Institutes of Health") (www.nlm.nih.gov/medtimeplus) that the period of time between exposure to HIV and progression to AIDS is eight-ten years, shorter period in children. This then gives rise to the question whether the general period of progression from HIV to AIDS of between eight-ten years could have been modified or accelerated by the underlying medical condition the deceased was suffering from. Such a question could only be answered by a medical expert in the HIV/AIDS field which was not adduced in this case.

[69] The evidence also showed that that there was a gap of five years between her first admission (in 2004) and her last admission (in 2009) into the defendant hospitals. There was no record of her treatment during these five years before the High Court. The question whether there was a break in the causative link between the defendants' negligence (if any) and the deceased's death will also arise for consideration.

[70] To use the words of Edgar Joseph Jr SCJ in *Sundram Ramasamy, supra*, we were of the view that there were no objective facts from which it could be inferred, as a matter of reasonable probability, that the deceased here had died of AIDS as found by the judge.

Appellate Intervention Required In This Case

[71] This is a clear case where the trial judge failed to look at all the facts and to weigh and evaluate all the cotemporaneous documents before him before arriving at his decision. In the case of *Lee Ing Chin @ Lee Teck Seng & Ors v. Gan Yook Chin & Anor* [2003] 2 MLJ 197; [2003] 2 CLJ 19, the Federal Court held that a decision arrived at by a trial court without judicial appreciation of the evidence before it runs the risk of the decision being set aside on appeal. We were of the view that this was a fit and proper case where appellate intervention was warranted to correct the findings of fact made by the learned judge.

Conclusion And Order

[72] For all the above reasons, we allowed the appeal and set aside the decision and order of the High Court. As the defendants had indicated they would not be asking for cost, we therefore made no order as to cost.